

IN THE
United States Court of Appeals
For the Ninth Circuit

PALMBERG CONSTRUCTION Co.,
an Oregon Corporation,
Appellee-Appellant,

v.

SIMPSON TIMBER COMPANY,
a Washington Corporation,
Appellant-Appellee,

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF PALMBERG CONSTRUCTION Co.,
as Appellant

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as Appellant

PREFACE

Under the rules and stipulation, this brief of the appellant/appellee Palmberg Construction Co. must be limited to its reply to Simpson's answering brief and deal only with the issues raised on Palmberg's appeal. Unfortunately, Palmberg is not permitted to refer or answer Simpson's arguments and representations on Simpson's appeal. Further argument on Simpson's

appeal must await oral argument. However, Palmberg earnestly requests that the Court in evaluating Simpson's reply and replication brief avail itself of the many references in each of the briefs, and determine from the *trial record* what evidence was produced, upon what portion of that evidence the Court was justified in instructing the jury as it did, which of said evidence the jury was entitled to believe or disbelieve, and upon which of said evidence the jury was entitled to base its verdict.

Reply on Palmberg's Assignment of Error No. 1

The Court will remember that this assignment involves the issue of Palmberg's right to interest on that portion of its recovery which Simpson, both by its correspondence and even in its pleadings in this case, consistently and repeatedly admitted was always due Palmberg. It is significant that while Palmberg's argument in its brief relied in large part upon the fact that Simpson had admitted, even in its own pleadings, that Simpson owed at least this liquidated sum of \$16,187.00, and had refused to pay it only on the basis of its unjustified counterclaim, that Simpson in its reply brief ignores that portion of Palmberg's argument. Simpson gives this Court no explanation of its admission in its answer that this sum was due and that Simpson had continued to retain it only on the basis of its claimed offset.

Simpson's present argument is that Palmberg should have accepted this sum, even though it was obviously tendered as full settlement (Ex. 18). Simpson now states that Palmberg *might* have been able to have argued at a later time that its claim for additional compensation did not "arise out of" the contract, but was extraneous to it. Simpson now argues that Palmberg should have run the risk of waiving or jeopardising its claim for extra compensation on the basis of this rather fine distinction which Simpson now makes in its brief, but clearly neglected to make in its prior tender.

Commencing at the bottom of page 3 of its reply brief, Simpson states:

"What Palmberg has failed to recognize is the clear distinction that the court drew at p. 241 of its decision; that is, the distinction between a tender of payment represented to be payment in full for all work performed, and a tender of payment represented to be payment only for work done under a contract. It is the latter type of tender that was made by Simpson."

Counsel's statement is directly contrary to the *admitted* fact. Paragraph XXXI of the admitted facts in the pretrial order stated in part:

"Defendant has tendered to plaintiff its check in the sum of \$16,187.00, which amount defendant tendered to plaintiff as payment in full of *all obligations* from defendant to plaintiff *arising out of the work performed.*" (Tr. 144-145).

The trial court also instructed the jury that this was an admitted fact (R. Vol. VI, 18), to which Simpson took no exception.

In its reply brief Simpson claims that this Court drew that distinction in the case of *Walla Walla Port District v. Palmberg* (CA 9, 1960) 280 F. 2d 237. Actually in that case this Court specifically refused to adopt Simpson's present argument. As shown in the second portion of the footnote commencing at page 241 of the *Walla Walla* case, the appellant Port District in that case propounded the exact same argument which Simpson now makes. Said the Court in that footnote,

"On the issue of the allowance of interest, appellant urges that the judgment based on the jury verdict was a recovery *outside* the contract, and not within the contract provisions relating to extras, and that therefore acceptance of the final *contract* payment under the rule laid down in the *Hersey* case would not bar the recovery of damages *outside* the contract." (Emphasis is that of the Court).

In *Walla Walla*, the Court clearly rejected that argument.

Simpson's conditional tender of the retainage was insufficient to stop the running of interest. For that purpose a tender must be unconditional. *Grant v. Auvil*, (1951) 39 Wn. 2d 722, 728, 238 P. 2d 393.

Simpson next argues that Palmberg never billed Simpson for the retained amount which Simpson at all

times admitted was due under the contractual rate, but offered to pay only if Palmberg would accept it in full payment of Simpson's contractual obligation. As shown at pages 11 and 12 of Palmberg's first brief, Palmberg by one letter (Ex. 17) specifically demanded payment of this retainage, and by another letter (Ex. 19) stated that the withholding of this amount was completely unjustified and that interest thereon would be claimed. Having twice in writing specifically requested payment of this amount, it is difficult to see how any additional billing could have buttressed Palmberg's legal right to its interest.

This portion of Palmberg's claim was an agreed amount. Obviously Palmberg was claiming that it was also entitled to compensation *in addition* to this agreed amount. However, Simpson at all times agreed that Palmberg was entitled to at least this amount. The computation attached to Simpson's letter of October 12, 1961 (Ex. 16) read as follows:

"September 1, 1961

**Total Amount Owed to Palmberg Construction
Company for Shelton Dredging Operations**

460,947 Cubic Yards at \$.40 C.Y.-----	\$184,379
Mobilization & Demobilization of Two Dredges-----	9,000
Stand-by Time -----	3,870
Redredging Around Pond Saw-----	1,520
	<hr/>
	198,769

4% Washington State Sales Tax-----	7,951
Total Owed -----	206,720
Total Paid to Date-----	190,533
Total Remaining Balance-----	<u><u>\$ 16,187"</u></u>

The fact that Palmberg was able to produce evidence which convinced the jury that it was entitled to more than this amount, because it had dredged more materials and because it had been required to dredge some of those materials from farther distances and under more adverse conditions than originally agreed upon, certainly did not change the fact that Palmberg was at all times entitled to at least this \$16,187.00 and that Simpson had wrongfully continued to retain it. Obviously, Palmberg was required to introduce evidence to show why it was entitled to the additional compensation. However, had Palmberg elected to introduce no evidence, it would on Simpson's very pleadings have been entitled to this \$16,187.00. How can Simpson now claim that it was rightfully entitled to withhold that amount, even though both parties always agreed that that amount was admittedly due?

At page 4 of its answering brief, Simpson quotes language taken from the case of *Wright v. Tacoma*, 87 Wash. 334, 353, 151 Pac. 837. In that case the City admitted that there was due the contractor

\$71,444.84, while the contractor claimed some \$150,000.00 more. The City did pay this \$71,444.84 prior to suit, but failed to do so until several months after acceptance of the work. The contractor then sued for the balance, recovering slightly less than \$100,000.00. The Court quite properly held that interest was not allowable on this latter amount because it was unliquidated and required evidence to prove. However, the Court also held that the contractor *was* entitled to interest on the \$71,444.84 for the period from the acceptance of the work until its payment. In *New Zealand Insurance Co. v. Earnmoor S.S. Co.*, (CA 9) 79 Fed. 368, the defendant, though in effect admitting a lesser sum was due than claimed, failed to pay the lesser sum. In allowing interest this Court stated:

“The appellant had, of course, the right to contest the amount claimed from it; but surely it ought to have offered to pay the amount it admitted to be due. Instead of doing so, it withheld from the appellee for nearly seven years what it admitted was justly due from it; . . .”

Other cases in which interest has been allowed on that portion of a claim admitted to be due include *Paine-Gallucci Inc. v. Eivind Anderson*, (1952) 41 Wn. 2d 46, 246 P. 2d 1095, and *Sociedad Armadora A.P. v. 5,020 Long Tons of Raw Sugar*, (DC Pa., 1954) 122 Fed. Supp. 892, and, of course, *Walla Walla Port District v. Palmberg*, (CA 9, 1960) 280 F. 2d 237. In some of these cases the defendant paid the

admittedly due portion of the claim, either prior to judgment or suit, but in each, interest has been awarded for the time during which the amount was wrongfully withheld. A defendant should not be rewarded for being adamant and permitted to retain the benefit of the use of a sum admittedly due by refusing to pay it until forced to do so by judgment.

Even now, Simpson does not argue that Palmberg was not at all times entitled to this \$16,187.00. Even on its own appeal, it does not argue that Palmberg was not clearly entitled to at least that amount. It does not even attempt to refute the fact that Palmberg has been deprived of the use of the money admittedly due, owing and unpaid during this period, or that Simpson has had the use of it during all of that period. Simpson's argument now is that Palmberg should have run the risk of accepting that amount in full and final payment.

Reply on Palmberg's Assignment of Error No. 2

In its reply to Palmberg's argument on this assignment, which dealt with the claimed error in the pre-trial judge's order, Simpson does not attempt to justify either the form or content of that order, but now argues merely that Palmberg was not prejudiced by it. Simpson also now argues that Palmberg should have attempted to violate this pretrial order and should have attempted to introduce its evidence of what it had been told by Simpson as to the nature of the materials,

even though the pretrial judge had ruled such evidence inadmissible.

The prejudice to Palmberg of the pretrial order is apparent. One indication is the lengthy colloquy (R. 9-42) initially required. The Court by its Instruction No. 26 (R. Vol. VI, 34) even instructed the jury as to portions of the content of that order.

While not attempting in its reply brief to sustain the propriety of that order, Simpson does imply that the mention of the word "debris" in the definition of an operating hour is similar to the reference to debris in the case of *Walla Walla Port District v. Palmberg*, (CA 9, 1960) 280 F. 2d 237. The distinction between the references in the two contracts is great. The Walla Walla contract specifically defined what would be included in the definition of "debris" for the purposes of that contract. It also provided that the cost of removal of such debris should be at the expense of the contractor, and that the cost thereof should be considered as incidental to and included in the contract price. 280 F. 2d 237, 243.

Palmberg believes that the pretrial judge's order, both in form and in content, was in error.

Reply on Palmberg's Assignment of Error No. 3

Had Simpson specifically conditioned its acceptance of Palmberg's offer to put a second dredge on this job upon the requirement of a definite completion date, Simpson's reply argument to this assignment might

have some validity. However, as clearly shown by the documentary evidence (Exs. 10 and 11) no such requirement was added to the written contract. Two, and only two, "additional terms" were added. Neither dealt with a completion date. The jury should not have been permitted to interpolate what may have been Simpson's motive in modifying the contract as adding another additional term to it.

CONCLUSION

Simpson's reply brief has failed to illustrate any justification for withholding payment of the \$16,187.00 which it at all times admitted was due. Simpson's brief contains no valid reason why interest should not be allowed on that amount. On Palmberg's Assignment No. 2 dealing with the impropriety of the pretrial judge's order, Simpson does not attempt to justify that order but merely claims that Palmberg was not prejudiced by it. With reference to Palmberg's Assignment No. 3, Simpson's brief fails to point out any contractual agreement or term of the contract which required completion by any definite date.

The judgment should be increased by the amount of the interest to which Palmberg is entitled, and otherwise affirmed.

Respectfully submitted,

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JAMES E. O'HERN

Attorneys for Appellant-Appellee Palmberg

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. O'HERN
Of counsel for Palmberg

